**Valley West Health Care, Inc. d/b/a Driftwood Convalescent Hospital a/k/a Scenic Circle Care Center *and* Hospital and Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO.** Case 32–CA–12289

September 21, 1993

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On November 10, 1992, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings and conclusions,[2] to modify the recommended remedy, and to adopt the recommended Order as modified.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by proffering the Union, on December 16, 1991, a final proposal which: (1) did not contain tentative agreements previously reached; (2) did not contain proposals previously made; and (3) substituted regressive proposals. In addition, we agree with the judge that Respondent violated Section 8(a)(5) and (1) by withdrawing that proposal and by engaging in overall bad-faith bargaining.

To restore the status quo ante, the judge recommended that Respondent be required to offer the substantive proposal that would have been made on December 16, but for the unlawful conduct. That is, Respondent's proposal must include the tentative agreements and the proposals previously made, and the proposal must delete the regressive proposals. Under the recommended Order, the proposal must remain outstanding for a reasonable period of time. If the Union accepts the proposal, the Respondent is required to execute an agreement containing all the terms of that offer, and to give that agreement retroactive effect. *Northwest Pipe & Casing Co.*, 300 NLRB 726 (1990). See also *Mead Corp.*, 256 NLRB 686, 686–687 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983).

The judge also considered that the duration of the agreement being proposed in the Respondent's final offer was: (1) dependent on the date of the Union's acceptance; (2) binding for a period of 1 year from ''_____, 1991'' to ''_____, 1992''; and (3) automatically renewed in the absence of the requisite notice. Consequently, since the Respondent's unlawful withdrawal precluded the Union's acceptance on January 13, 1992 (the date of the scheduled ratification vote), the judge recommended that any agreement resulting from the Union's acceptance of the reinstated proposal be binding from January 13, 1992, for a period of 1 year up to and including January 13, 1993. The judge noted that any uncertainty regarding the date of the Union's acceptance of the Respondent's final proposal must be resolved against the Respondent as a wrongdoer.

We agree with the judge that restoration of the status quo ante is best achieved by requiring the Respondent to offer the substantive proposal that would have been made but for the unlawful conduct, and by requiring that the offer remain in effect for a reasonable period of time.[3]

Contrary to the judge, however, we deny retroactive effect to the Respondent's final proposal. Unlike in *Mead* and *Northwest Pipe*, the Respondent's proposal did not expressly provide for retroactivity. On the contrary, the duration clause in the Respondent's proposal expressly contemplates that any resulting agreement will be binding prospectively for a period of 1 year. Consonant with the manifest intent of the Respondent's proposal, we find that if the Union accepts this proposal within a reasonable period of time after its reinstatement, the resulting agreement will be binding prospectively for a period of 1 year after execution of the agreement.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Valley West Health Care, Inc. d/b/a Driftwood Convalescent Hospital a/k/a Scenic Circle Care Center, Modesto, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Reinstate its December 16, 1991 final contract proposal and afford the Union a reasonable period of time to accept that offer, and, if the Union accepts the offer within said reasonable time, sign a contract containing all of the terms of that offer and give the

[1] The Respondent excepts ''to each and every statement in the Decision, from page 7, line 45, to the end of the Decision.'' We have identified the nature of various exceptions by the Respondent from its brief. The Respondent's blanket exception to the judge's decision even as fleshed out by its brief does not well serve the purposes of Sec. 102.46(b) of our Rules, which require specificity. To the extent the Respondent's brief does not make clear what the Respondent excepts to, we deem the matters waived. See Sec. 102.46(b)(2).

[2] The Respondent asserts that the judge's conclusions of law are the result of bias. After a careful examination of the record and the judge's decision, we are satisfied that this allegation is without merit.

[3] This remedial order, unlike the one at issue in *H. K. Porter Co.*, 397 U.S. 99 (1970), which required the employer to agree to a dues-checkoff provision, does not compel an agreement. Rather, we merely require the Respondent to reinstate proposals it previously voluntarily presented during negotiations and subsequently withdrew in contravention of the Act.

agreement prospective effect for 1 year from the date of execution.''

2. Substitute the attached notice for that of the administrative law judge.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL–CIO as the exclusive bargaining representative of the employees in the following appropriate unit:

> All licensed vocational nurses, nurse aides, housekeeping, laundry, cook, dietary aide, and rehabilitation aide employees employed by us at our Modesto, California, facility, excluding all other employees, including registered nurses, office clerical employees, activity workers, guards, administrative personnel, assistant supervisors, and supervisors as defined in the Act.

WE WILL NOT renege on tentative agreements that we have reached with the Union during collective-bargaining negotiations or withdraw our collective-bargaining proposals in order to frustrate collective bargaining or to prevent the negotiation of a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union, as the exclusive representative of our employees in the bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL reinstate our December 16, 1991 final contract offer and afford the Union a reasonable period of time to accept that offer, and, if the Union accepts the offer within a reasonable time, sign a contract containing all of the terms of that offer and give the agreement prospective effect for a period of 1 year from the date of execution.

WE WILL include in our reinstated December 16, 1991 final contract offer the tentative agreements we previously reached with the Union concerning the inclusion of the licensed vocational nurses in the bargaining unit, concerning the definition of employees' seniority, and concerning the eligibility of employees for 3 weeks of paid vacation.

WE WILL include in our reinstated December 16, 1991 final contract offer our proposal that we made previously to the Union to share with the Union the cost of the arbitrator when a contract dispute is submitted to arbitration.

WE WILL include in our reinstated December 16, 1991 final contract offer our proposal which we made previously to the Union to pay 50 percent of a unit employee's health and dental insurance costs during his or her first year of employment, after 500 hours of work, and to allow unit employees to pay for their dependents' coverage under the health and dental insurance plans.

VALLEY WEST HEALTH CENTER, INC. D/B/A DRIFTWOOD CONVALESCENT HOSPITAL A/K/A SCENIC CIRCLE CARE CENTER

*Jeffrey L. Henze*, for the General Counsel.
*N. Paul Shanley (Hubbert, Shanley and Cohen)*, for the Respondent.
*Paul Supton (Van Bourg, Weinberg, Roger & Rosenfeld)*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held on August 6, 1992, is based on an unfair labor practice charge filed by Hospital and Health Care Workers Union, Local 250 (Union), on January 14, 1992, and a complaint issued on March 17, 1992, by the Regional Director for Region 32 of the National Labor Relations Board (Board), on behalf of the Board's General Counsel, alleging that Valley West Health Care, Inc. d/b/a Driftwood Convalescent Hospital a/k/a Scenic Circle Care Center (Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

The complaint alleges that during its 1991 negotiations with the Union for a collective-bargaining agreement to cover an appropriate unit of Respondent's employees represented by the Union, Respondent failed and refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act, by engaging in the following conduct: withdrew from an agreement that licensed vocational nurses would be included in the bargaining unit covered by the collective-bargaining agreement; withdrew from an agreement to use employees' original dates of hire to compute their seniority and the vacation pay entitlement for employees with 5 or more years of seniority; made a regressive grievance-arbitration proposal under which the party requesting arbitration is to bear the full cost of arbitration, which was contrary to its previous bargaining proposal; withdrew its prior bargaining proposal to pay 50 percent of the employees' health insurance costs during the first year (after 500 hours) and to pay 50 percent of the employees' dental insurance costs (after

500 hours) and to permit employees to pay for dependent coverage under these plans; and, failed to provide the Union with an adequate opportunity to review and consider its final contract offer presented on December 16, 1991, prior to withdrawing said offer. In its answer to the complaint, Respondent denied the commission of the alleged unfair labor practices.[1]

On the entire record, from my observation of the demeanor of the sole witness, Rachael Bunton, and having considered the posthearing briefs submitted by counsels for the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

### I. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*

Respondent is a corporation doing business in Modesto, California, where it has operated a nursing home since early 1989, when it acquired the nursing home from another employer. See *Driftwood Convalescent Hospital*, 302 NLRB 586 (1991).

On April 17, 1991, the Board issued its Decision and Order in *Driftwood Hospital*, supra, finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the ''licensed vocational nurses, nurses aids [sic], housekeeping, laundry, cook, dietary aids [sic], and rehabilitation aid [sic] employees'' employed at Respondent's Modesto nursing home. In its answer to the complaint in the instant proceeding, Respondent admits that since April 17, 1991[2] the Union has been recognized by the Respondent as the exclusive bargaining representative of an appropriate unit of ''all licensed vocational nurses, nurses aids [sic], housekeeping, laundry, cook, dietary aids [sic], and rehabilitation aid [sic] employees'' employed at Respondent's Modesto nursing home.

In compliance with the Board's Order issued in Valley West Health Care Respondent commenced collective-bargaining negotiations on August 14. Negotiation sessions were held on August 14, September 16, 17, and 27, October 4, 16, and 28, and December 3. The December 3 negotiation session was the last one.

During the December 3 negotiation session the Union's negotiator asked Respondent to submit a final contract proposal to the Union. Subsequently, on December 16 Respondent's attorney submitted to the Union, in writing, Respondent's ''final proposal.'' The terms of Respondent's December 16 final contract proposal differed from Respondent's prior bargaining position, in certain respects, as described hereinafter.

The parties' negotiators by the end of the December 3 negotiation session had agreed that, if the parties reached agreement on the terms of a complete collective-bargaining agreement, the unit employees employed as licensed vocational nurses would be included in the contractual bargaining unit, pending the results of any unit clarification petition that Respondent might wish to file with the Board.[3] However, the ''recognition'' provision of Respondent's December 16 final contract proposal, does not include the unit employees employed as licensed vocational nurses.[4] Rather that part of the final contract proposal reads, in pertinent part, as follows:

> The Employer recognizes the Union as the sole exclusive bargaining representative for the purpose of collective bargaining . . . of all nurse's aides, housekeeping, janitors, laundry, cook, dietary aide and rehabilitation aide employees. Excluded from the foregoing recognition and bargaining unit shall be all other employees of the Employer . . . .

The parties' negotiators by the end of the December 3 negotiation session had agreed, if the parties reached agreement on the terms of a complete collective-bargaining agreement, that the agreement's seniority provision would provide, inter alia, that the unit employees' seniority would be dated from the date they first began to work at the Modesto facility and not the date when Respondent acquired the facility and that the agreement's vacation pay provision would provide, inter alia, that in computing whether employees had 5 years of seniority for purposes of vacation pay the employees' original dates of hire, rather than the date Respondent acquired the facility, would be used. However, the seniority provision contained in Respondent's December 16 final contract proposal, contrary to the above agreement, states that ''[a] regular employees' seniority is defined as his/her most recent period of continuous service *with the Employer* (emphasis added).''[5] Nor does the final proposal reflect the above agreement concerning the computation of employees' vacation pay. Rather it merely states that ''after 5 years of continuous employment'' full-time employees eligible for a vacation shall be granted 3 weeks of vacation with pay. It is silent about how the 5 years' period of continuous employment will be computed.

As of the end of the December 3 negotiation session, the Respondent's proposal concerning health and welfare which had been made to the Union, included not only the provisions which are contained in Respondent's December 16 final contract proposal, but also provided that Respondent would pay 50 percent of a unit employee's health insurance

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[1] In its answer to the complaint, Respondent admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard, and also in its answer, as amended at the hearing, admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] Unless otherwise stated, all dates hereinafter refer to the year 1991.

[3] As I have indicated supra, in its answer to the complaint, Respondent admits that at all times material herein the Union has been the exclusive representative of an appropriate unit of employees which include those employed as licensed vocational nurses, and admits that Respondent has recognized the Union as the representative of Respondent's licensed vocational nurses.

[4] However, the part of Respondent's December 16 final contract proposal which provides that ''[t]he straight-time hourly rates of pay shall be shown in Appendix A,'' includes among the classifications set forth in ''Appendix A,'' the classification of licensed vocational nurse and the minimum starting hourly rate for the employees employed in that classification.

[5] Respondent's December 16 final contract proposal provides that ''in all matters of layoffs and recalls, the principle of seniority shall prevail'' and further provides that for other matters involving the ''selection'' of unit employees, if skill, ability and experience are relatively equal then the principle of seniority shall govern.

and dental insurance costs during his/her first year of employment after the employee worked 500 hours and that Respondent would allow a unit employee to pay for dependent coverage under both the dental and health plans. The health and welfare provision contained in the Respondent's December 16 final contract proposal reads as follows:

> Full time employees are eligible for coverage and may elect to be enrolled for health and dental coverage through the Employer's OMI plan, or its equivalent, effective the first day of the calendar month after completion of 500 clock hours of work during the first year of employment. During an employee's second year of employment and for all subsequent years, the Employer will pay 60 percent of the employee's cost of coverage.

As of the end of the December 3 negotiation session, Respondent had proposed to the Union that when one of the parties submitted a contractual dispute to arbitration pursuant to the grievance and arbitration machinery set forth in the parties' collective-bargaining agreement, the ''expense of the arbitrator shall be shared equally between the parties'' and that the total cost of any stenographic record shall be paid by the party ordering it. In its December 16 final contract proposal Respondent withdrew this proposal and now proposed that ''[t]he expense of the arbitrator, including the reporter's expense, shall be borne exclusively by the party requesting arbitration.''

During the last negotiation session held on December 3, as I have found supra, the Union's negotiator asked Respondent to submit a final contract proposal. Also, during this meeting, the Union's negotiator informed Respondent's representative that ratification by the Union's members was required before the Union agreed to a collective-bargaining agreement. Previously, at the start of the negotiations, Respondent had been informed by the Union that any collective-bargaining agreement would have to be ratified by the membership.

The Union's negotiator throughout the negotiations was Jake Jacobs. He was accompanied to all of the negotiation sessions by Union Field Representative Rachael Bunton, who was assigned to, among other things, service the unit employees involved in this case.

On Monday, December 16, in response to Jacobs' December 3 request for a final contract proposal, Respondent's attorney David Cohen whose office is in Sacramento, California, faxed to Bunton's office in Sacramento, the following letter, addressed to Bunton:

> Re: *Scenic Circle Health Care – Employer Final Proposal*
>
> Dear Ms. Bunton:
>
> Enclosed with this letter please find a final proposal from the management of Scenic Circle Health Care with regard to the negotiations between your Union and this facility, which final was requested by Mr. Jake Jacobs during our last meeting on Tuesday, December 3, 1991. This offer is being placed on the bargaining table by the Employer and is subject to acceptance by 12:01 a.m., Wednesday, December 25, 1991. If it is not accepted by the above date, this final offer will be removed from the bargaining table and all proposals, offers, and tentative agreements previously reached will be null and void and will be subject to change.
>
> If you have any questions regarding this matter, please do not hesitate to call upon me.

On December 16, Bunton, who was away from her office all day long on business, telephoned in for her messages in the afternoon and was informed by her secretary about the receipt of Respondent's final contract offer and that the cover letter which accompanied the offer set an acceptance deadline of December 25.

Since Jacobs, who was the Union's negotiator, was on vacation from December 14 through January 5, 1992, Bunton tried to get advice about this matter from the Union's attorney Paul Supton, and her immediate supervisor, Charley Ridgell, the head of the Union's Convalescent Home Division. She was unable to speak to them, however, until Friday, December 20, at which time she sent the following telegram to Attorney Cohen:

> THE UNION RECEIVED THE EMPLOYERS FINAL OFFER ON DECEMBER 16, 1991, THE TIME FRAME THE EMPLOYER IS DEMANDING FOR ACCEPTANCE BY DECEMBER 25, 1991 BY 12:01AM IS RIDICULOUS. THIS DEMAND IS INAPPROPRIATE DUE TO THE FACT THAT THE UNION REQUIRES ADEQUATE TIME TO REVIEW YOUR PROPOSED FINAL OFFER IN FULL AND TO NOTIFY OUR MEMBERS AT SCENIC CIRCLE FOR A REVIEW AND VOTE OF YOUR PROPOSED FINAL OFFER. PLEASE RESPONSE AT YOUR EARLIEST CONVENIENCE.

Upon receipt of Bunton's December 20 telegram, Attorney Cohen promptly responded to Bunton, by letter, dated December 20, which reads as follows:

> I am in receipt of the telegram which you sent December 20, 1991, in which you request an extension of time to consider the employer's final proposal in negotiations at Scenic Circle Care Center. The Employer's final proposal was requested by the Union during a negotiating meeting on December 3, 1991, and therefore it should have been expected by the Union, and then prepared for in anticipation of having to call a meeting to vote the membership. If it were not for the inept handling of this matter by the Union, as evidenced by your failure to request an extension for four days after receiving the final proposal, you certainly could have contacted and voted your membership in time, since as far as I know the U.S. Postal Service and all telephone companies are still operating in the greater Modesto area. Instead you have waited until four days after receipt of the final to even request a continuance. The deadline which was set was not ''ridiculous'' as you stated, if you had pursued the matter in timely fashion.
>
> However, in light of the Union's request, and inability to act with an entire week's notice, I will hereby extend the time for consideration of the final proposal until 12:01 a.m. January 1, 1992. If the contract is not accepted by that time, then the final offer will be removed from the bargaining table and all proposals, offers, and tentative agreements previously reached will be null and void and will be subject to change.

If you have any questions regarding this matter, or if you would like directions on how to contact your membership, please do not hesitate to call upon me.

Attorney Cohen's December 20 letter was faxed to Bunton's office that same day, a Friday, and was received by her late that afternoon. The next 2 days (Saturday and Sunday), Bunton was off from work. She was also off from work on Monday, December 23, through Wednesday, December 25.[6] When she returned to work on the day after Christmas, December 26, she telephoned her Superior, Charley Ridgell, for his advice on how to deal with Attorney Cohen's December 20 letter.[7] During their conversation Bunton informed Ridgell that there appeared to have been changes made in Respondent's final contract offer from Respondent's previous bargaining position. Ridgell instructed Bunton not to speak to Respondent about the final contract offer until she and Jacobs had met and checked the contents of the Respondent's final contract offer against the Union's bargaining notes. Ridgell also told her that although Jacobs was still on vacation, he was expected to be home on December 27 and that Bunton should telephone him at home.

On December 27 Bunton telephoned Jacobs at his home and told him about the Respondent's final contract offer and the correspondence surrounding that offer, and they agreed to meet to review the final offer, when Jacobs returned to work from his vacation, and also agreed that the employee-members' ratification meeting would be held January 13, 1992. In fact, at that time Bunton arranged to rent for January 13, 1992, the meeting room at the motel in Modesto, California, which the Union usually uses for its membership meetings held in Modesto.

On December 27, following Bunton's conversation with Jacobs, she faxed the following letter to Attorney Cohen:

Re: Ratification/Rejection Meeting on Employer's Final and Best Offer

Dear Mr. Cohen:

Upon returning from vacation on December 26, 1991, I received your fax and letter regarding Scenic Circle's Final Offer. Unfortunately, Jake Jacobs and a rank and file member of the bargaining committee are still on vacation. As such the Union is unable to comply with your deadline of January 1, 1992, for ratification of the contract. However, I have scheduled a meeting with the members on Monday, January 13, 1992, for a vote of the membership. This Will allow the appropriate labor law prerogative for an adequate review of your proposed offer and time to notify our members. Please be advised that the Union will notify you immediately after the last vote meeting on January 13, 1992 of the results of the membership vote.

Thank you for your attention to this matter.

Upon receipt of Bunton's December 27 letter, Attorney Cohen on the same day faxed the following letter to Bunton:

Re: Scenic Circle Final Offer – Deadline For Vote

Dear Ms. Bunton:

I am in receipt of your letter dated December 27, 1991, which was faxed to my office on this date. Contrary to your assertion, you were provided with notice of the January 1 deadline on December 20th after requesting an additional continuance on that date. The fact that Mr. Jacobs and a rank and file member of the bargaining committee are on vacation, have no impact on a deadline which was set by the employer and presented to you along with our final offer. It is not the employer's problem that Mr. Jacob's and the rank and file employee are not at work.

As I indicated in my letter on December 20, 1991, the Union had requested the employer's final proposal as early as December 3, 1991, and therefore should have anticipated its presentation and been prepared to contact the membership and put this matter to a vote. On December 16, 1991, you were provided with the Employer's final offer, and a deadline of December 25, 1991, was set. You delayed requesting a continuance until December 20th, but at that time were granted a week's extension. The Union then delayed until December 27th to again seek more time. These dilatory tactics and/or ineptitude will not longer be tolerated. Your request for an additional continuance until January 13, 1992, is denied.

The employer has already granted you one extension of time in which to vote this document and stands by our last proposal and the January 1, 1992 deadline. The Union has had ample time to review all proposals made by this employer and to contact your membership and to put this matter to a vote. As indicated in my letter dated December 20, 1991, if the final offer is not accepted by the deadline of 12:01 a.m., January 1, 1992, then all proposals, offers, and tentative agreements previously reached will be null and void and will be removed from the bargaining table, and will be subject to change at any future negotiations.

### B. *Discussion*

As I have found supra, the terms of Respondent's final contract proposal submitted to the Union on December 16 differed from Respondent's prior bargaining position, in these respects: the final contract proposal excluded the licensed vocational nurses from the contractual bargaining unit, even though Respondent had previously agreed that if it reached agreement with the Union on a contract, the licensed vocational nurses employed by Respondent would be included in the contractual bargaining unit; the final contract proposal defined an employee's seniority as the employee's ''most recent period of continuous service with the Employer,'' even though Respondent had previously agreed that if it reached agreement with the Union on a contract, the contract's seniority provisions would provide, inter alia, that a unit employee's seniority would date from when the employee first began work at the facility and not the date when Respondent acquired the facility; the final contract proposal provided that ''after 5 years of continuous employment,'' employees eligible for a vacation will be granted 3 weeks of vacation with pay, whereas Respondent had previously agreed, that if it reached agreement with the Union on a con-

[6] I note that the week of Monday, December 23, was Christmas week and the week of Monday, December 30, was New Year's week.

[7] Bunton's office is in Sacramento, California, and Ridgell's office is in San Francisco, California, and Jacobs' is in Oakland, California.

tract, the contract would provide that in computing whether an employee has 5 years of seniority for purposes of vacation pay, the employee's original date of hire, rather than the date Respondent acquired the facility, would be used;[8] the final contract proposal stated that during an employee's second year of employment and thereafter, Respondent was obligated to pay 60 percent of the employee's health and dental insurance coverage under Respondent's insurance plans, however, the final contract proposal did not provide that during an employee's first year of employment Respondent would pay any of these costs, nor did it provide for the coverage of employees' dependents under the Respondent's health and dental plans, whereas Respondent had previously proposed to the Union that Respondent would pay 50 percent of a unit employee's health and dental insurance costs during his/her first year of employment after the employee worked 500 hours, and that Respondent would also allow unit employees to pay for dependents' coverage under both the dental and health plans; and, the final contract proposal provided that when either Respondent or Union exercise their right to submit a contractual dispute to an arbitrator, under the contract's grievance-arbitration machinery, that ''the expense of the arbitrator, including the reporter's expense, shall be borne exclusively by the party requesting arbitration,'' whereas prior to the final contract proposal the Respondent had proposed that the expense of the arbitrator would be shared equally between the parties.

In summation, the record establishes that by virtue of the terms of its December 16 final contract proposal, Respondent engaged in the following conduct: reneged on its tentative agreement that the licensed vocational nurses would be included in the contractual bargaining unit; reneged on its tentative agreement that the seniority of the unit employees would be dated from the date they first began to work at the facility, rather than from the date when Respondent acquired the facility; reneged on its tentative agreement that employees' seniority for purposes of vacation pay would be computed using the employees' original date of hire, rather than the date Respondent acquired the facility; substituted regressive proposals to take the place of the aforesaid tentative agreements; withdrew its proposal to pay 50 percent of a unit employee's health and dental insurance costs during his/her first year of employment, after the employee worked 500 hours, and to allow unit employees to pay for dependents' coverage under both the health and dental plans, and instead substituted a health and welfare proposal which omitted those provisions; and, withdrew its proposal that the parties share the expense of the arbitrator when a contractual dispute was submitted to arbitration, and instead proposed that the requesting party bear the expense of the arbitrator.

If an employer withdraws a bargaining proposal on which tentative agreement has been reached and, in its place, substitutes a regressive proposal, this conduct has the inevitable and foreseeable effect of obstructing and impeding the collective-bargaining process. It is because of this that the law is settled that ''[t]he withdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed upon . . .'' *Mead Corp. v. NLRB*, 97 F.2d 1013 (11th Cir. 1983). Thus, where, as here, the Respondent has withdrawn from tentative agreements during negotiations, ''the issue here is not whether the Respondent acted in good faith, but whether the Respondent had good cause in unilaterally withdrawing from tentative agreements and concessions made.'' *Arrow Smith & Door Co*., 281 NLRB 1108 fn. 2 (1980). Accord: *Natico, Inc*., 302 NLRB 668 (1991).

As I have found supra, by virtue of its December 16 final contract proposal Respondent reneged on its tentative agreement that licensed vocational nurses would be included in the contractual bargaining unit; reneged on its tentative agreement that the seniority of the unit employees would be dated from the date they first began to work at the facility; reneged on its tentative agreement that employees' seniority for purposes of vacation pay would be computed by using the employees' original dates of hire; and, submitted regressive proposals to take the place of the aforesaid tentative agreements it had reached with the Union.

Respondent failed to call a single witness to explain why in its December 16 final contract proposal it repudiated the above-described tentative agreements and substituted regressive proposals. Nor did Respondent explain to the Union its reason for engaging in this conduct. I therefore find Respondent has failed to establish it had good cause for withdrawing from the above-described tentative agreements and substituting regressive proposals.[9] Accordingly, I further find that Respondent, by withdrawing from its tentative agreements with the Union, bargained in bad faith with the intent of obstructing meaningful bargaining and of frustrating the negotiation of a collective-bargaining agreement, in violation of Section 8(a)(5) and (1) of the Act.

I also find Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its bargaining proposals which provided that the parties share the cost of an arbitrator, that Respondent pay 50 percent of employees' health and dental insurance plan costs after 500 hours of work during their first year of employment, that employees be allowed to pay for their dependents' insurance coverage under Respondent's

[8] I considered that the final contract proposal does not specifically state whether the 5-year period of continuous employment will be measured in terms of continuous employment with the Employer or continuous employment at the facility. However, when this provision is read in conjunction with that part of the final contract proposal which specifically defines a unit employee's seniority in terms of the ''most recent period of continuous service with the Employer,'' it is clear that Respondent's intent was to measure seniority for vacation pay purposes in terms of continuous employment with Respondent and this was the way the Union would have reasonably construed the provision.

[9] The Union engaged in two strikes against Respondent; one for a period of 3 days in October and another for a period of 1 day in November. In its posthearing brief Respondent argues its withdrawal from the tentative agreements herein and its substitution of regressive proposals was not unlawful because ''the Employer has successfully weathered a series of strikes by the Union, which altered the respective bargaining positions and power at the negotiation table.'' I have not considered this argument because it lacks evidentiary support. There is no evidence whatsoever that this was Respondent's reason for engaging in any of the conduct alleged to have violated the Act in this proceeding. Under the circumstances, it would be sheer speculation for me to infer that it was the change in the parties' relative bargaining strength, caused by the Union's unsuccessful strikes, that motivated Respondent's conduct herein.

health and dental plans, and by substituting regressive proposals in their place, in the December 16 final contract proposal. The context in which Respondent engaged in the aforesaid conduct establishes it was done with the intent to obstruct meaningful bargaining and to frustrate the making of a contract. For, as I have found supra, Respondent engaged in this conduct at the same time it was obstructing and frustrating the bargaining process, in violation of the Act, by withdrawing from several tentative agreements previously reached with the Union and in their place substituting more regressive proposals. Under the totality of these circumstances, and in view of Respondent's failure to explain its motive for withdrawing the aforesaid bargaining proposals and substituting regressive proposals, I find Respondent's motivation was to obstruct meaningful bargaining and to frustrate the making of a collective-bargaining agreement. I further find that by engaging in this conduct Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act.

Lastly, I find Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its December 16 final contract proposal in order to frustrate bargaining and to prevent the negotiation of a collective-bargaining contract. My reasons for this finding are as follows.

Respondent imposed such an unreasonably short time limit on the Union's acceptance of the Respondent's December 16 final contract proposal, that when this factor is considered with the other factors discussed infra, it warrants the inference that the deadline was designed by Respondent for the purpose of frustrating the negotiation of a contract. Respondent initially imposed a 9-day deadline, ending on Christmas morning, and when the Union protested it could not meet this deadline because it did not provide the Union with sufficient time to review the final contract proposal and arrange for its members to attend a ratification meeting, the Respondent reluctantly gave the Union another 7 days, until New Year's Day, to accept the final contract proposal. In other words, Respondent ultimately imposed a 16-day time limit on the Union's acceptance of the final contract proposal, even though it must have known the following: the Union would have to review and consider whether the Respondent's final contract proposal was satisfactory to the Union and the employees it represented; the Union would have to arrange for a meeting of its members employed by the Respondent for the purpose of reviewing the proposal with them and to conduct a ratification vote; and, the Union would have to engage in the aforesaid conduct during the Christmas–New Year's holiday season, when it is not uncommon for people to take time off from work or have their minds on less serious matters than their work or work-related matters. In fact, when Union Representative Bunton notified Respondent's attorney that the Union was unable to comply with Respondent's New Year's Day deadline, Bunton explained to the Respondent's attorney that she had been absent from work for several days during the week of Christmas and that the Union's negotiator Jacobs and one of the employees on the Union's negotiating committee were still on their vacations. Nonetheless, Respondent refused to budge from its 16-day deadline. I recognize that an employer has a legitimate interest for imposing a deadline on a union's acceptance of a contract proposal. However, under the circumstances of this case, the deadline imposed by the Respondent was unreasonably short and when this factor is considered with the other factors discussed infra, it warrants the inference that the deadline was designed by the Respondent for the purpose of obstructing meaningful bargaining and to frustrate the negotiation of a collective-bargaining contract.

Respondent's reasons for imposing a 16-day time limit on the Union's acceptance of the Respondent's December 16 final contract proposal, despite the Union's objection, are so unsatisfactory, that when considered in the context of the other factors discussed herein, it warrants the inference the deadline was designed by Respondent to frustrate the negotiation of a contract. Respondent failed to call a single witness to explain why it imposed the 16-day deadline and refused the Union's request that it be extended. In other words, Respondent failed to present evidence of the existence of a legitimate employer interest in imposing a 16-day limit on the Union's acceptance of the Respondent's final contract proposal.

Respondent's principal justification, as set forth in its attorney's letters to the Union, was that Respondent thought the 16 days gave the Union ample time to review and submit Respondent's contract proposal to the Union's members for ratification, because, as explained to the Union by Respondent's attorney in his December 27 letter: ''[a]s I indicated in my letter on December 20, 1991, the Union had requested the employer's final proposal as early as December 3, 1991, and therefore should have anticipated its presentation and been prepared to contact the membership and put this matter to a vote.'' This statement cannot be taken seriously and borders on the frivolous, because there is no evidence that when the Union on December 3 asked Respondent to submit a final contract proposal, that Respondent indicated it would comply with this request or that it informed the Union of the approximate date on which the Union could reasonably expect to receive the proposal. Nor is there evidence that the Union knew of the contents of Respondent's final contract proposal before its receipt, or that prior to its receipt the Union should have reasonably known of its contents. In fact, as described supra, it is undisputed that Respondent's December 16 final contract proposal differed from its prior bargaining position in at least several significant respects, which Respondent must have realized would require the Union's careful consideration. Thus, there is a lack of evidence to support a finding that Respondent reasonably believed the Union should have taken steps several days prior to its receipt of Respondent's December 16 final contract proposal to arrange for the proposal's ratification by the Union's membership. Absent such evidence, the statement of the Respondent's attorney to the Union that Respondent believed that the Union should have taken such steps cannot be taken seriously and borders on the frivolous.

Equally frivolous was Respondent's statement to the Union that it was not Respondent's problem that the Union's negotiator Jacobs and one of the employees on the Union's negotiating committee were on vacation; a statement made by Respondent's attorney to the Union in response to the Union's explanation that the reason it was unable to comply with Respondent's New Year's Day deadline was that Jacobs and one of the employees on the Union's negotiation committee were still on their vacations. I find that because the events herein occurred in the midst of the Christmas–New Year's holiday season it should have been understandable to

Respondent that people might be on vacation during the period that it was demanding the Union to act upon Respondent's final contract proposal. Also, since Jacobs was the Union's negotiator, it should likewise have been understandable to Respondent why the Union and the employees it represented would be hesitant to act upon Respondent's final contract proposal without Jacobs' advice. Lastly, other than its attorney's statement to the Union that since the Union had requested a final proposal on December 3, it should at that time have anticipated its presentation and prepared for a ratification meeting, Respondent did not explain why it refused to accept what appeared to have been a perfectly legitimate reason for the Union to ask for a short extension of Respondent's New Year's Day deadline for the Union's acceptance of the Respondent's final contract offer. I recognize that in its posthearing brief Respondent's attorney indicates that the reason Respondent discounted the importance of Jacobs was that it believed Union Representative Bunton was well qualified to act in his place. I have not considered this argument because no one from Respondent testified that this was what prompted Respondent to require the Union to act on Respondent's final contract proposal, even though it knew the Union's negotiator was still on vacation. As I have found supra, Respondent failed to present evidence of a legitimate employer interest in imposing such a short time limit on the Union's acceptance of Respondent's final contract proposal, especially considering that the proposal was submitted at the start of the Christmas–New Year's holiday season and Respondent knew that on account of the holidays the Union's negotiator was absent from work on vacation.

Respondent, as I have found supra, by virtue of the terms of its December 16 final contract proposal repudiated several tentative agreements reached previously with the Union and in their place substituted regressive contract proposals, and also withdrew two of its bargaining proposals made previously to the Union and substituted in their place regressive proposals, and, as I have also found supra, engaged in this conduct for the purpose of obstructing meaningful bargaining and to frustrate the negotiation of a contract, in violation of Section 8(a)(5) and (1) of the Act. Therefore, when the deadline which Respondent imposed on the Union's acceptance of the Respondent's December 16 final contract proposal is viewed in this context and in the context of the other factors discussed supra, it warrants the inference that Respondent's motive for imposing the deadline was to obstruct meaningful bargaining and to frustrate the negotiation of a contract.

In summation, when viewed in their totality, the aforesaid factors—the unreasonably short time limit imposed by the Respondent on the Union's acceptance of the Respondent's December 16 final contract proposal, the lack of evidence of a legitimate employer interest for Respondent's imposition of this time limit, the failure to withstand scrutiny of the reasons Respondent gave to the Union to justify its imposition of the time limit, and the inclusion in the December 16 final contract proposal of provisions which were designed to obstruct meaningful bargaining and to frustrate the negotiation of a contract—establish that when Respondent withdrew its final contract proposal, after the Union failed to meet Respondent's deadline, that the withdrawal of the proposal was motivated by Respondent's desire to obstruct meaningful bargaining and to frustrate the negotiation of a collective-bargaining contract. I therefore find that by withdrawing its December 16 final contract proposal Respondent failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. *Northwest Pipe & Casing Co.*, 300 NLRB 726 (1990).

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All licensed vocational nurses, nurse aides, housekeeping, laundry, cook, dietary aide, and rehabilitation aide employees employed by Respondent at its Modesto, California facility, excluding all other employees, including registered nurses, office clerical employees, activity workers, guards, administrative personnel, assistant supervisors, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been and is now the exclusive collective-bargaining representative of the employees employed in the aforesaid appropriate bargaining unit, within the meaning of Section 9(a) of the Act.

5. By the terms of its December 16 final contract proposal, Respondent reneged on tentative agreements previously reached with the Union concerning the inclusion of the licensed vocational nurses in the bargaining unit, the definition of employees' seniority, and the eligibility of employees for 3 weeks of paid vacation, and engaged in this conduct for the purpose of frustrating the negotiation of a collective-bargaining agreement, thereby violating Section 8(a)(5) and (1) of the Act.

6. By the terms of its December 16 final contract proposal, Respondent withdrew its previous contract proposal to share with the Union the cost of the arbitrator when a contract dispute is submitted to arbitration and withdrew its previous contract proposal to pay 50 percent of a unit employee's health and dental insurance costs during his/her first year of employment after 500 hours of work and to allow unit employees to pay for their dependents' coverage under both the health and dental insurance plans, and substituted in their place regressive proposals, and engaged in this conduct for the purpose of frustrating the negotiation of a collective-bargaining agreement, thereby violating Section 8(a)(5) and (1) of the Act.

7. Respondent withdrew its December 16 final contract proposal for the purpose of obstructing meaningful bargaining and to frustrate the negotiation of a collective-bargaining agreement, thereby violating Section 8(a)(5) and (1) of the Act.

8. By engaging in the conduct set forth in paragraphs 5 through 7 above, Respondent engaged in over-all bad-faith bargaining without a sincere desire to reach a collective-bargaining agreement, thereby violating Section 8(a)(5) and (1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to

cease and desist and that it take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its December 16, 1991, final contract proposal in order to frustrate the negotiation of a collective-bargaining agreement, I shall recommend an order which, among other things, requires Respondent to reinstate its December 16, 1991, final contract proposal for a reasonable time and if the Union notifies the Respondent within this reasonable time that the December 16 offer is accepted, Respondent shall be required to sign a collective-bargaining agreement containing all of the terms of that offer and to give the agreement retroactive effect. *Northwest Pipe & Casing Co*., supra. See also *Mead Corp*., 256 NLRB 686, 686–687 (1981), enfd. 97 F.2d 1013 (11th Cir. 1983).[10]

Having found that for the unlawful purpose of frustrating the negotiation of a collective-bargaining agreement, Respondent, by the terms of its December 16 final contract proposal, reneged on tentative agreements previously reached with the Union, and having found that for the same unlawful reason, Respondent, by the terms of its December 16 final contract proposal, also withdrew previous contract proposals, and having further found that Respondent engaged in all of this unlawful conduct, in the context of the withdrawal of its December 16 final contract offer, for the unlawful purpose of frustrating the negotiation of a collective-bargaining agreement, I am of the opinion that restoration of the status quo ante would best be achieved not only by requiring Respondent to reinstate its December 16 final contract offer for a reasonable time, but by also requiring Respondent to include as a part of the reinstated December 16 final contract offer the above-described tentative agreements and proposals unlawfully omitted from its December 16 final contract offer.

I have considered that the duration of the collective-bargaining agreement being proposed by the Respondent's December 16 final contract proposal was dependent on the date of the Union's acceptance. In this respect, article 34 of the final proposal provides in pertinent part:

> This Agreement shall be binding from ____ 1991, for a period of one (1) year, up to and including ____ 1992. It shall be considered as renewed from year to year thereafter unless either party hereto shall give written notice to the other of their desire to have the same modified, and such notice must be given at least ninety (90) days prior to the date of termination. . . .
>
> Since it was Respondent's unlawful withdrawal of the December 16 final contract proposal which precluded the Union's acceptance of the proposal on January 13, 1992, the date of the scheduled meeting of the Union's members to vote on the proposal, I shall recommend, consistent with the terms of the final proposal, that the agreement resulting from the Union's acceptance of the proposal be binding from January 13, 1992, for a period of 1 year up to and including January 13, 1993.[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

## ORDER

The Respondent, Valley West Health Center, Inc. d/b/a Driftwood Convalescent Hospital a/k/a Scenic Circle Care Center, Modesto, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith concerning wages, hours, and other conditions of employment with the Union, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All licensed vocational nurses, nurse aides, housekeeping, laundry, cook, dietary aide, and rehabilitation aide employees employed by Respondent at its Modesto, California, facility, excluding all other employees, including registered nurses, office clerical employees, activity workers, guards, administrative personnel, assistant supervisors, and supervisors as defined in the Act.

(b) Reneging on tentative agreements which we reach with the Union during collective-bargaining negotiations or withdrawing our collective-bargaining proposals in order to frustrate collective bargaining or to prevent the negotiation of a collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union, as the exclusive bargaining representative of its employees in the above-described appropriate bargaining unit with respect

[10] I disagree with Respondent that ''according to the court in Mead, only where acceptance by the Union appears to be imminent would the court require the Employer to put the final [offer] back on the table for consideration by the union.'' In *Mead* the court, as did the Board, concluded that the respondent-employer violated Sec. 8(a)(5) and (1) of the Act by withdrawing its contract proposal knowing that acceptance by the union was imminent. I can find nothing, however, in the court's opinion which would warrant the conclusion that the court was implying that it is only in cases where an employer withdraws its final contract proposal after a union's acceptance appears imminent that it would be appropriate for the Board to restore the status quo ante by requiring the employer to reinstate its final contract offer.

[11] Although there is no certainty that the Union would have accepted the Respondent's final contract proposal on January 13, 1992, any uncertainty must be resolved against Respondent as the wrongdoer who is responsible for the uncertainty. See *NLRB v. Remington Rand, Inc*., 94 F.2d 862, 872 (2d Cir. 1938). See also *Bigelow v. RKO Pictures, Inc*., 327 U.S. 251, 256 (1946) (''[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created''); *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 880 (3d Cir. 1968) (where there was uncertainty whether union would have been able to resist employer's demand to decrease employees' share of profits, had the employer not unlawfully refused to bargain, ''the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act'').

[12] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Reinstate its December 16, 1991 final contract proposal and afford the Union a reasonable period of time to accept that offer or to make counterproposals in light of changed circumstances, and, if the Union accepts the offer within said reasonable time, sign a contract containing all of the terms of that offer and give the agreement retroactive effect.

(c) Include in its reinstated December 16 final contract offer the tentative agreements previously reached with the Union concerning the inclusion of the licensed vocational nurses in the bargaining unit, concerning the definition of employees' seniority, and concerning the eligibility of employees for 3 weeks of paid vacation.

(d) Include in its reinstated December 16, 1991 final contract offer its proposal made previously to the Union to share with the Union the cost of the arbitrator when a contract dispute is submitted to arbitration.

(e) Include in its reinstated December 16, 1991 final contract offer its proposal made previously to the Union to pay 50 percent of a unit employee's health and dental insurance costs during his/her first year of employment, after 500 hours of work, and to allow unit employees to pay for their dependents' coverage under the health and dental insurance plans.

(f) Post at its Modesto, California facility copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''